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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-2052

DANNY SMITH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Asistant Attorney General

DON A. LANGHAM
First Assistant Attorney General

JOHN C. WALDEN
Senior Assistant Attorney General

SUSAN V. BOLEYN
Assistant Attorney General

DUPONT K. CHENEY
District Attorney

KENNETH R. CARSWELL
Assistant District Attorney

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

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QUESTIONS PRESENTED

1.

Whether the Georgia courts properly applied federal law in determining that a warrant for the search of the Shrimp Boat "Miss Carol J." was issued based on a finding of probable cause?

2.

Whether the Georgia Court of Appeals properly affirmed Petitioner's conviction based on its finding that the Petitioner's accomplice's testimony was sufficiently corroborated in accordance with Georgia law?

PART ONE

STATEMENT OF THE CASE

Petitioner, Danny Smith, was convicted in the Superior Court of Liberty County, Georgia, on one count of possession of marijuana with intent to distribute. On appeal to the Court of Appeals of Georgia, Petitioner cited as error, the denial by the trial court of his motion to suppress evidence which he claimed had been illegally seized as a result of allegedly illegal searches and seizures. Petitioner had urged in his motion to suppress heard by the trial court that the search warrant for the "Miss Carol J." was issued without probable cause, making any subsequent search and seizure illegal. However, the trial court found that probable cause for the issuance of the search warrant existed. The trial court noted that there was included in the search warrant an affidavit containing a sworn statement by investigating officer, Deputy Sheriff John Dasher; an eyewitness account by accomplice Don Michael Drake, incorporated by reference to the affidavit, and further, that prior to issuing the warrant, the justice of the peace had heard the sworn testimony of G.B.I. Agent Stone. Therefore, the trial court denied Petitioner's motion to suppress.

When the validity of the trial court's ruling was examined on appeal to the Georgia Court of Appeals, that court referred to the companion case of Cuevas v. State, 151 Ga. App. 605, 607(1) (1979) and found that the ruling in that case, in which the court reviewed a similar motion to suppress and found that it was properly denied, was also controlling in the instant case.

The Court of Appeals of Georgia cited state law, as well as federal law in determining that this contention was without merit.

A motion for rehearing filed in the Court of Appeals of Georgia was denied on March 31, 1980. The Supreme Court of Georgia denied Petitioner's application for a writ of certiorari on April 29, 1980. This petition for a writ of certiorari followed. Further facts will be developed as is necessary for a more thorough illumination of any issue raised in this petition for a writ of certiorari.[1/]

[1/] A detailed statement of the facts surrounding the search and seizure now challenged by the Petitioner is set forth in Appendix No. 4 to the Petitioner's brief, i.e., a copy of the opinion of the Court of Appeals of Georgia in Cuevas v. State, 151 Ga. App. 605 (1979).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE GEORGIA COURT OF APPEALS PROPERLY FOUND THAT THE TRIAL COURT COMMITTED NO ERROR IN DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM THE "MISS CAROL J.", AS THE SEARCH WARRANT WAS PROPERLY ISSUED.

Petitioner argues that the search warrant issued for the search of the Shrimp Boat, "Miss Carol J." was without probable cause. An affidavit of John Dasher, Deputy Sheriff of Liberty County, Georgia was attached to the search warrant. Petitioner argues that this affidavit from Deputy Sheriff Dasher is not sufficient probable cause upon which to issue the search warrant. Petitioner claims that the affidavit from the Deputy Sheriff was insufficient because he had "no knowledge of the matters related," because his information was based upon the unsworn statement of accomplice Don Michael Drake, made to G.B.I. Agent Ralph Stone and Deputy Groover. Petitioner is therefore claiming that the affidavit on which the search warrant was based contained hearsay information and could not properly be used to find probable cause for the issuance of the search warrant by the justice of the peace.

In considering Petitioner's allegation, the Court of Appeals of Georgia noted that in the companion case of Cuevas v. State, 151 Ga. App. 605 (1979), the court had extensively reviewed a similar motion to suppress evidence and that this ruling was controlling in the instant case.

However, the Court of Appeals of Georgia went further and stated that:

> "Hearsay information which relates to the criminal activity in such detail as to assure the magistrate that the information provided is more than a casual rumor circulating in the underworld may also establish the needed credibility and reliability. Sams v. State, 121 Ga. App. 46, 48 (1)(172 S.E.2d 473); Smith v. State, 136 Ga. App. 17, supra. There is no merit in this complaint."

(Appendix to Petitioner's brief, p. 4).

The trial court had determined that the proper standard was met to authorize the issuance of the search warrant based on the affidavit of Deputy Sheriff Dasher, by noting that attached to the affidavit and incorporated by reference, was a detailed eyewitness account by Don Michael Drake as given to G.B.I. Agent Ralph Stone. The trial court noted that the affidavit of Deputy Sheriff Dasher related his investigation and corroborated the statement of Don Michael Drake. The trial court also noted that prior to issuing the warrant, the justice of the peace had the additional sworn testimony of G.B.I. Agent Stone. (Appendix to the Petitioner's brief, p. 35). The trial court concluded that on the basis of all of these factors, the justice of the peace properly found that probable cause existed for the issuance of the warrant. The testimony held in the hearing on the motion to suppress the evidence, apparently convinced the Court of Appeals of the reliability of the hearsay information contained in the affidavit and its attachments and it found that the information

before the magistrate was sufficient "to assure the magistrate that the information provided is more than a casual rumor circulating in the underworld."

Although the Petitioner cites Spinelli v. United States, 393 U.S. 410 (1969), in support of this allegation, the language just cited from the Court of Appeals opinion is taken directly from Spinelli v. United States, supra. Id. at 416. Therefore, the Spinelli standard for the determination of the reliability of hearsay information was actually used by the Court of Appeals of Georgia.

Further, the Georgia decision cited by the Court of Appeals of Georgia in Smith v. State, 136 Ga. App. 17 (1975), properly cites the other applicable federal standards in determining whether or not an affidavit based on hearsay is reliable. For example, the Court of Appeals of Georgia, in Smith v. State, supra, cited the decision of this Court in United States v. Ventreska, 380 U.S. 102, 108 (1965), for the proposition that:

> "Hearsay may support the issuance of a valid warrant if the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that the informant was credible or his information reliable."

Smith v. State, supra, also cited the decision of this Court in Jones v. United States, 362 U.S. 257 (1960), for the proposition that obervations of an informant, even if they are hearsay, are sufficient to establish probable cause as long as there is a substantial basis for crediting such hearsay.

It should be noted that in many cases, such as Spinelli v. United States, 393 U.S. 410 (1969), the informant was unidentified. In the instant case, the informant was specifically identified, as was the manner in which the informant made his observations of criminal activity.

As this Court noted in United States v. Harris, 403 U.S. 517 (1971), a statement which is an admission of one's own criminality can be used in establishing credibility. This method of establishing the reliability of an informant's hearsay information was also noted by the Georgia Court of Appeals in Smith v. State, 136 Ga. App. 17, 19 (1975). The testimony of G.B.I. Agent Stone and the statement of Mr. Drake attached to the warrant was an admission of criminality under the standards of United States v. Harris, supra. The statement of Don Michael Drake shows his admission that he had been hired as a lookout and had served as a lookout for this smuggling operation. The affidavit further shows that the information which he provided was obtained by personal contact with the suspects of the illegal operation,that the information concerning the off-loading of marijuana was furnished within 24 hours of witnessing the act and this information included a detailed description of the criminal operation. As the hearsay used as the basis for the affidavit was that of a named informant, making a declaration against his penal interest, the reliability of the hearsay information was sufficiently established to authorize a finding of probable cause for the issuance of the search warrant by the magistrate, as required under federal law.

Additionally, as noted by the trial court, the statement of Don Michael Drake was not the only statement establishing the credibility and reliability

of the hearsay information in the affidavit. Deputy Dasher furnished information in this affidavit which indicated how independent investigation by the Liberty County Sheriff's Department, corroborated the statement of Mr. Drake. (Appendix to Petitioner's brief, p. 29-30). Therefore, there was further support for the reliability of the affidavit of Deputy Sheriff Dasher.

As the Court of Appeals of Georgia properly applied the federal legal standards in determining that the affidavit, containing reliable hearsay information; was sufficient to authorize a finding of probable cause to issue the search warrant on behalf of the magistrate, this issue presents nothing for review by this Court.

B. IN DETERMINING THAT THE TESTIMONY OF PETITIONER'S ACCOMPLICE WAS SUFFICIENTLY CORROBORATED, THE GEORGIA COURTS PROPERLY APPLIED GEORGIA LAW, SO AS TO PRESENT NOTHING FOR THE REVIEW OF THIS COURT.

Petitioner contends that this Court should review the question of whether or not the testimony of Petitioner's accomplice was uncorroborated so as to be violative of his rights to due process under the United States Constitution. The Court of Appeals of Georgia examined the question of whether or not the accomplice's testimony was sufficiently corroborated by facts and circumstances directly connecting the Petitioner with the crime, in accordance with principles enunciated in numerous Georgia cases. The Georgia Court of Appeals cited the decision of the Supreme Court of Georgia in Smith v. State, 238 Ga. 640, 641 (1977), as setting out the standard. The applicable portion of Smith v. State, supra, reads as follows:

> "It is the law in Georgia that the testimony of an accomplice used to convict the accused of a crime must be supported by independent corroborating evidence as to the identity and participation of the accused tending to connect him to the crime or leading to the inference that he is guilty. Code Ann. § 38-121 (5742; 1017 P.C.). See, e.g., Birt v. State, 236 Ga. 815 (225 S.E.2d 248)(1976); West v. State, 232 Ga. 861 (209 S.E.2d 195)(1974); Allen v. State, 215 Ga. 455 (11 S.E.2d 70)(1959). However, the corroborating evidence need not of itself be sufficient to warrant a conviction of the crime charged."

Smith v. State, 238 Ga. 640, 641-642 (1977).

The Georgia Supreme Court also noted in Smith v. State, supra, that whether or not there is sufficient corroboration of the testimony of an accomplice is a jury question under Georgia law and that only slight evidence of corroboration need be shown, as a matter of law. Id. at 642.

The Court of Appeals of Georgia found that the accomplice's fingerprints, found on a legal pad and coffee cup in the wheelhouse of the Shrimp Boat from which marijuana was seized, as well as his wallet and picture found on board the boat, corroborated his testimony. Additional corroboration was supplied by the accomplice's testimony that he had in fact been aboard the Shrimp Boat, the "Miss Carol J." twice and had left his billfold on the boat, although he contended that it was not on the date alleged by the state. The Court of Appeals of Georgia applied the Georgia standard for determining whether there was sufficient corroboration and found that these items supported the accomplice's testimony in such a way as to connect the Petitioner to the crime or lead to the inference that he was guilty of the crime. As the Georgia courts properly applied Georgia law, no federal question is presented for this Court's review.

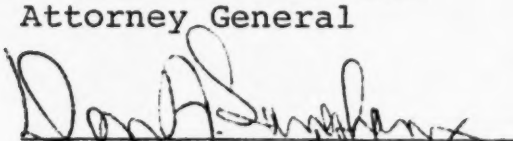
CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's writ of certiorari as Petitioner's rights under the Fourth Amendment were not violated by the issuance of a search warrant and the admission of items seized pursuant to that warrant and as the Georgia courts properly applied Georgia law in determining that the testimony of Petitioner's accomplice was sufficiently corroborated.

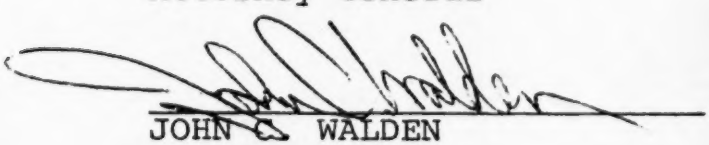
Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General



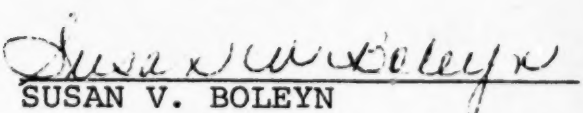
DON A. LANGHAM
First Assistant
Attorney General



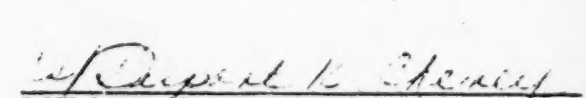
JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

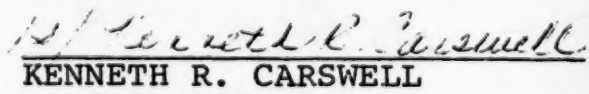
SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397



SUSAN V. BOLEYN
Assistant Attorney General



DUPONT K. CHENEY
District Attorney



KENNETH R. CARSWELL
Assistant District
Attorney

CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. Lewis M. Groover, Jr.
2801 Buford Highway, N.E.
Suite 375
Atlanta, Georgia 30329

This 4th day of August, 1980

Susan V. Boleyn
SUSAN V. BOLEYN